JUN 27 PAGE 3

Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1741

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner,
vs.
STATE OF OKLAHOMA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

June, 1985

BEST AVAILABLE COPY

Happ

No. 84-1741

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,

Petitioner,

vs.

STATE OF OKLAHOMA,

Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record

June, 1985

QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires the State to reveal to the Defendant investigatory leads which are deadends, even in the absence of a request by the Defendant.

2. Whether an experienced criminal defense lawyer calling twelve alibi witnesses in the first stage of a capital murder case, but calling no witnesses nor making any argument in the sentencing stage deprived the Defendant of effective assistance of counsel.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Opinion and Judgment Delivered Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 3

A. Procedural History 3

B. Statement of the Facts . . . 4

Summary of the Argument 16

Why the Writ of Certiorari Should be Denied 19

I.

THE REJECTED INVESTIGATORY LEAD COMPLAINED OF BY THE DEFENDANT WOULD NOT HAVE CREATED A REASONABLE DOUBT REGARDING HIS GUILT AND NEED NOT HAVE BEEN PROVIDED BY THE PROSECUTION IN THE ABSENCE OF A REQUEST. 19

II.

DEFENDANT'S ATTORNEY GAVE HIM CONSTITUTIONALLY EFFECTIVE ASSISTANCE AT TRIAL. 24

Conclusion 40

TABLE OF AUTHORITIES

Cases Cited	Page
Bowen v. State of Oklahoma, No. F-81-315	1
Daugherty v. State, 640 P.2d 558 (Okl. Cr. 1982)	37
Hall v. State, 650 P.2d 893 (Okl.Cr. 1982)	20
Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980)	36
Moore v. Illinois, 408 U.S. 786 (1972) . . .	21, 22, 23
Strickland v. Washington, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed. 2d 674 (1984)	26, 27, 29 30, 31-32, 38, 39, 40
United States v. Agurs, 427 U.S. 97 (1976) . . .	19, 20, 23, 24
United States v. Chronic, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed. 2d 657 (1984)	35
United States v. Glick, 710 F.2d 639 (10th Cir. 1983)	25

Statutory Provisions Cited

28 U.S.C. § 1257 2

21 O.S.Supp.1980, § 701.7 3

Constitutional Provisions Cited

United States Constitution,
Sixth Amendment 2

United States Constitution,
Fourteenth Amendment, § 1 3

No. 84-1741

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CLIFFORD HENRY BOWEN,
Petitioner,
vs.
STATE OF OKLAHOMA,
Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondent, State of Oklahoma, respectfully presents this as its Response in Opposition to the Petition for Writ of Certiorari filed herein.

OPINION AND JUDGMENT DELIVERED BELOW

The Oklahoma Court of Criminal Appeals' opinion in Bowen v. State of Oklahoma, No. F-81-315, was rendered on November 30, 1984. The Oklahoma Court

of Criminal Appeals denied the Petitioner's Motion for Rehearing on March 8, 1985.

JURISDICTION

The Petitioner invokes jurisdiction of this Court under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution are applicable to this case.

The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment, § 1, to the United States Constitution provides as follows:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Procedural History

Clifford Henry Bowen, hereinafter Defendant, was convicted on March 13, 1981, after jury trial in the District Court of Oklahoma County, State of Oklahoma, in that court's Case No. CRF-80-3397 of three counts of First Degree Murder under 21 O.S.Supp.1980, § 701.7. The jury sentenced the Defendant to die

in each count. The trial court overruled the Defendant's Motion for New Trial, and Amended Motion for New Trial on May 7, 1981, and judgment and sentence were imposed on that date.

The Defendant perfected his direct appeal to the Oklahoma Court of Criminal Appeals, in that court's Case No. F-81-315, and that court remanded the case to the trial court for an evidentiary hearing on the Defendant's second Motion for New Trial. The trial judge, the Honorable Raymond Naifeh, conducted an evidentiary hearing on that motion on September 29-30, 1983, and submitted Findings of Fact and Conclusions of Law on October 26, 1983. Thereafter, the Defendant filed a supplemental appellate brief in the Court of Criminal Appeals.

B. Statement of the Facts

On July 5, 1980, during the evening hours, a group of guests at the Guest

House Inn assembled by the pool. Mary Chilton, a night office clerk at the motel, worked until 10:00 p.m., and then joined her friends at pool side (Tr. 289). Later that evening, she notice a man who was not a guest at the motel (Tr. 292), standing at the concession stand, leaning upon the candy machine (Tr. 311). It was part of her duties to keep intruders off the premises (Tr. 292).

Harold Behrens, co-defendant of the Petitioner and one of the individuals at pool side, placed his hand upon the shoulder of Ray Peters, who is one of the decedents, said "see you tomorrow," and left via the concession area (Tr. 294). Such physical contact upon parting company was not Behrens' normal practice (Tr. 422). Then, Mary Chilton also left by way of the concession area.

This area is very well lit by floodlights from the roofline (Tr. 234, 312), lights on the ceiling of the vending machine area (Tr. 232, 298-99), and light from the vending machines themselves (Tr. 237). All of the above-mentioned lights were on (Tr. 298). Mary Chilton walked within three feet of the man and looked right at him (Tr. 295). She had no trouble seeing the Defendant's face (Tr. 299). In addition, Mary Chilton had a good view of the Defendant when she was sitting at the pool side (Tr. 308). She gave an accurate description of the Defendant's height, weight, and physical stature (Tr. 307). The Defendant had a pale complexion (Tr. 317). This was substantiated by others (Tr. 355). Mary Chilton "memorized" the Defendant's face (Tr. 13), and there was no doubt in her mind that the Defendant

was the man that she saw at the concession stand (Tr. 293, 295, 326).

Carrie Pitchford, her husband, and her daughter also were pool side (Tr. 331). The family left the pool area at 1:30 a.m. and went to their room (Tr. 332). While her husband and her daughter went to bed immediately, Carrie did not. She thought about going back out and twice looked out the window to see if any of the women were still by the pool (Tr. 333). She looked out a third time and saw a large, pale complected man, subsequently identified as the Defendant, leaning upon a machine at the concession stand (Tr. 335). The Defendant looked straight up at Carrie Pitchford so that she could see his full face (Tr. 336). She viewed the Defendant for "one full minute or more." (Tr. 354.) The lighting was very good; it was similar to a stage (Tr. 339, 349). Carrie

Pitchford had not been drinking that evening (Tr. 343). She had no trouble seeing the Defendant's features (Tr. 339), and there was no doubt in her mind that the Defendant was the man whom she had seen that evening (Tr. 336). As soon as Carrie laid down, she heard gunfire, jumped up, and saw one of the decedents slump in his pool side chair (Tr. 337).

The manager of the motel noticed an individual in the concession area (Tr. 359). The description of the individual and his attire were substantially the same as the description given by other witnesses. The manager also saw a car with womeone sitting in it (Tr. 360). The manager and his wife heard "firecrackers" and then noticed an individual, with a red cap in his hand, shooting a gun (Tr. 361). The manager summoned the police (Tr. 363). As this was

being done, a car exited the motel parking lot at a high rate of speed (Tr. 364).

When the police arrived, they found three men sitting at a pool side table, all of whom had at least two gunshot wounds (Tr. 209). Six .45 caliber spent casings were found, as well as one lead projectile (Tr. 210). At 2:30 a.m., photographs of the scene were taken, and the lighting of the premises, with the assistance of two flashlights, was adequate with which to take photographs (Tr. 220). There were floodlights upon the roofline (Tr. 234), lighting upon the ceiling of the vending machine area (Tr. 232), lighting from the vending machines themselves (Tr.237), and lighting from the motel sign (Tr. 237). The lighting was so good that the photographer stated that "I could load my

camera, read my settings, read the tape measure" (Tr. 235).

On July 6, an autopsy was performed upon all three bodies. The death of Ray Peters was caused by two gunshot wounds to the head which resulted in extensive lacerations and a brain hemorrage (Tr. 251). Loose gunpowder was found upon the body; therefore, the gun was discharged within two feet of the body (Tr. 252). Lawrence Evans had three gunshot wounds inflicted by hollow point bullets (Tr. 256-57). The cause of death was the wounds (Tr. 260). Marvin Nowlin had two gunshot wounds which caused his death (Tr. 268). Pathological symptoms of drug use were found in Peters and Nowlin (Tr. 271). All of the cartridges were fired from the same gun (Tr. 279). Hollow point bullets were used to caused greater damage upon impact (Tr. 283).

In an effort to connect Harold Behrens, a co-defendant, with the Defendant and to provide a motive, the testimony of two additional witnesses was introduced. In 1975, David McBride supervised the organized crime detail of the Oklahoma City Police Department. Harold Behrens, an ex-police officer, was assigned to participate in the surveillance of Jerry Ray James and the Defendant (Tr. 405). During the later stages of the investigation, Harold Behrens resigned from the police department (Tr. 408). Immediately after the resignation, Jerry James and the Defendant disappeared from Oklahoma City (Tr. 409).

Jack Zumwalt testified that he lived with and was lover of Harold Behrens (Tr. 421). Harold Behrens made his living selling drugs and supported Jack Zumwalt while they lived together (Tr.

421). It was not the custom of Harold Behrens to have physical contact with people upon parting their company, as he had done on the early morning hours of July 6 (Tr. 422). Ray Peters worked for Harold Behrens as a drug dealer (Tr. 423). In June, Ray Peters had been arrested in Pauls Valley, Oklahoma, for driving under the influence and drug charges. Harold Behrens was afraid that Ray Peters would become an informant (Tr. 424). After Jack Zumwalt heard of Ray Peters' death, he asked Harold Behrens why Ray Peters and not Jim Powell, another drug seller. Harold Behrens replied, "because we need Jim." (Tr. 425.)

An arrest warrant was issued for the Defendant, and Officer Cook went to Tyler, Texas, to serve it (Tr. 432). The Defendant was advised of his rights (Tr. 433). The Defendant was questioned

about a number of people, but when he was asked if he knew Harold Behrens, he glanced down and said no (Tr. 436).

The Defendant presented an alibi defense. He presented numerous witnesses who claimed that on the evening in question, the Defendant was at a rodeo in Tyler, Texas. The Defendant took the stand in his own behalf and admitted that he had two prior felony convictions (Tr. 546). He claimed that on July 5, he was not in Oklahoma City (Tr. 549). He claimed that he has made his living since 1971 by gambling and supplemented that income through the purchase and sale of jewelry and real estate (Tr. 548, 522). The Defendant stated that he had psoriasis and was told to get as much sun as possible to remedy the malady, and consequently, that he had a suntan (Tr. 549). The Defendant further

alleged that he knew nothing about guns (Tr. 552).

Officer Harrison was called to testify for the defense. The officer stated that Mary Chilton initially identified a photograph of another, namely William Simmons, as the assailant. The officer attempted to secure an arrest warrant for Simmons. Upon cross-examination of Officer Harrison, he revealed that Mary Chilton never made a positive identification of Simmons as the assailant (Tr. 654), and that at an in-person lineup, Mary Chilton said that Simmons looked like the man but definitely was not him.

The State produced rebuttal witnesses. The arresting officer stated that upon arrest the Defendant was light-complected and did not have a tan (Tr. 575-76). This was confirmed by other witnesses (Tr. 580, 583). It was

also revealed that there is an airstrip within four minutes of the rodeo where the Defendant allegedly was (Tr. 577), and that a flight from Tyler, Texas, to the Oklahoma City downtown airpark would only take between 30-35 minutes (Tr. 581). Records of in and out flights are not kept, and less than one tank of gas would be required for the round trip. It is only 13 minutes from the Guest House Inn to the downtown airpark (Tr. 584), so that the entire trip would take less than one hour.

Williams Simmons testified. He is only 5'8" and 180 pounds, which is a much smaller frame than the one on the assailant (Tr. 593). To rebut the presumption raised by the Defendant that he knew nothing about guns, it was revealed that on July 7, 1977, in Plano, Texas, a search warrant was procured for a home in which the Defendant resided along

with his wife and another (Tr. 587). The Defendant was arrested and a search uncovered an arsenal of weapons (Tr. 587-88).

The Defendant was found guilty of three counts of Murder in the First Degree. After the second stage of trial, the jury determined that three aggravating circumstances existed and set the punishment for each count at death.

SUMMARY OF THE ARGUMENT

Petitioner was not denied due process of law in his trial for murder because the prosecution failed to disclose information of an investigatory deadend. At one point, police officer investigated a man named Lee Crowe, who was similar in stature to the Defendant. However, two eyewitnesses identified the Defendant rather than Lee Crowe as the

man present at the scene of the shootings. In addition, Crowe had an alibi. Further, Crowe's fingerprints were not found near the scene of the crime, nor were .45 caliber shell casings found at the crime matched with those which Crowe had fired as a police officer at a firing range in South Carolina. The Defendant made no request for exculpatory evidence prior to trial. The fact that police at one point inquired regarding Lee Crowe but later abandoned the inquiry when it became clear witnesses identified the Defendant rather than Crowe in no way creates a reasonable doubt as to Defendant's guilt, and, therefore, that evidence is not material in the constitutional sense.

The Defendant's trial counsel was an experienced criminal defense lawyer with 30 years' experienced who had previously been a prosecuting attorney. In the

defense case, counsel presented 12 alibi witnesses, attempting to show that the Defendant was not in Oklahoma City at the time of the murders. Instead, counsel tried to show that Defendant was in Tyler, Texas, at or near the time of the shootings. When the jury returned a guilty verdict for the offenses of gunning down three men in cold blood while they sat around a motel swimming pool, it became clear that the alibi defense did not persuade the jury. In light of that failure to persuade the jury, counsel made the tactical decision to do nothing in the sentencing phase. Counsel had successfully used this tactic in another case. By doing so, counsel hoped to secure a modification to life imprisonment should his client be sentenced to die. In any event, the Defendant did not have genuine mitigating evidence to offer. Even at this late

date, no such mitigating evidence is offered to this Court.

WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

I. THE REJECTED INVESTIGATORY LEAD COMPLAINED OF BY THE DEFENDANT WOULD NOT HAVE CREATED A REASONABLE DOUBT REGARDING HIS GUILT AND NEED NOT HAVE BEEN PROVIDED BY THE PROSECUTION IN THE ABSENCE OF A REQUEST.

The Defendant concedes that this is a case in which no request for exculpatory material was made by his trial counsel. Unless the failure of the prosecution to provide the information now complained of deprived the Defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside. United States v. Agurs, 427 U.S. 97, 108 (1976). Evaluating the supposedly withheld evidence in the context of the entire record, the omitted evidence is only material if it created a reasonable doubt that did not

otherwise exist. Necessarily, only the withholding of material evidence is constitutional error. Agurs, supra, 427 U.S. at 112. See, Hall v. State, 650 P.2d 893, 897 (Okl.Cr. 1982) (where no request for exculpatory evidence likelihood suppressed evidence would result in acquittal must be more than a reasonable probability).

The Lee Crowe lead relied upon by the Defendant was a false lead initially checked by police but later discarded when eyewitnesses at the scene identified the Defendant as the man who had laid in wait prior to executing the victims. Lee Crowe was never identified by any witness as being anywhere near the motel's swimming pool at which the three victims were shot to death. Quite the contrary, two witnesses positively identified the Defendant as the man who waited near the motel concession area

for others to leave the pool side party immediately before the three men were shot to death with hollow-point .45 caliber bullets. Neither did the .45 caliber automatic shell casings found at the scene of the triple murder match the .45 caliber shell casing Crowe had expended on the police firing range in South Carolina. See attached Affidavit of Detectives Cook and Horn, Appendix A. Finally, police secured a fingerprint card for Lee Crowe, and compared it with the fingerprints found at the crime scene with negative results. See Appendix A.

This Court's case of Moore v. Illinois, 408 U.S. 786 (1972), presents an almost identical factual situation. In Moore, two eyewitnesses identified the defendant as the man who shot a bartender following an altercation in a Chicago area bar. In addition, a bartender in

another bar identified a man known to him as "Slick" as having made statements that he had shot a bartender in Lansing, Illinois. It was reliably determined that the defendant Moore was both the shooter and the man who admitted the shooting, but that he was not "Slick." The police assigned a lieutenant to find "Slick" without success. In that case, this Court stated:

> "We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work in a case. Here, the elusive 'Slick' was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found. . . ." Moore v. Illinois, 408 U.S. at 795.

In Moore, the Court concluded that in light of all of the evidence, the witnesses' misidentification of the defendant Moore as "Slick" was not material to the issue of guilt. Id., 408 U.S. at 797. The Court came to this conclusion

even considering the fact that Moore had raised an alibi defense that he was working as a waiter in a country club about 50 miles from the scene of the shooting at the time the murder occurred. Id., 408 U.S. at 790-91.

In light of Agurs and Moore, it is clear that the early investigatory lead of Lee Crowe was not material to the Defendant's guilt or innocence. It is clear from eyewitnesses to the scene that the Defendant, not Crowe, was the shooter. Both witnesses Chilton and Pitchford selected Defendant positively from photo arrays also containing Lee Crowe. Both specifically ruled out Crowe. It is also clear that the Defendant was tied to Harold Behrens, who was present at the scene and who uncharacteristically pointed out Ray Peters by placing his hand on his shoulder to indicate to the shooter who his victim

was. The fact that the police early on investigated, but rejected, Lee Crowe as a suspect creates no reasonable doubt regarding the Defendant's guilt. The Constitution does not require disclosure of improper or trivial information which "might" affect the jury's deliberation. It only requires disclosure of evidence which might give rise to a legitimate doubt on the issue of guilt. United States v. Agurs, 427 U.S. at 108-09.

II. DEFENDANT'S ATTORNEY GAVE HIM CONSTITUTIONALLY EFFECTIVE ASSISTANCE AT TRIAL.

The Defendant now claims that he was denied constitutionally effective counsel by his trial attorney's failure to file certain motions and to challenge the evidence of one eyewitness. He further complains about counsel's failure to call the co-defendant, Harold Behrens, to testify that Behrens did not

know him and did not hire him for the assassination-style killing. He further challenges counsel's failure to more effectively rebut the prosecution's "airplane theory" as well as failure to request certain instructions and failure and object to certain comments of the prosecutor in closing argument. The Defendant further challenges his counsel's failure to submit evidence or argument in the sentencing phase of the trial.

As an initial matter, the Constitution does not require criminal defense counsel to pursue all plausible lines of defense. United States v. Glick, 710 F.2d 639, 644 (10th Cir. 1983). Where the Defendant's planned alibi defense has failed, he is, in hindsight, attempting to try his attorney by elevating everything that appellate counsel might have done differently to the level of a constitutional failure. This Court

condemned the "distorting effects of hindsight" in Strickland v. Washington, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed. 2d 674, 694 (1984), in stating that counsel's adequacy must be evaluated based upon counsel's perspective at the time. The Court also noted that there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. Id., 80 L. Ed. 2d at 695. Further, the Court recognized that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id., 80 L. Ed. 2d at 695.

In discussing the reliance upon reasonable professional judgment, this Court in Strickland stated:

> ". . . As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . ." Id., 80 L. Ed. 2d at 695.

As in Strickland, many of the decisions of counsel in the present case were strategic choices of an experienced criminal defense lawyer made in the exercise of reasonable professional judgment.

For instance, counsel could have challenged the fact that eyewitness Mary Chilton had undergone hypnosis prior to trial. However, Mary Chilton had given identical testimony before hypnosis, and a harsh attack on Chilton would have blunted counsel's attempts to portray

the eyewitnesses as honest, but mistaken, witnesses. Further, Carrie Pitchford, the other eyewitness, independently corroborated Mary Chilton without herself being hypnotized. It is only speculation to say what co-defendant Harold Behrens would have testified had he been called. Behrens was convicted and sentenced to life for his role in the Guest House Inn murders. The decision not to challenge certain statements of the prosecutors in closing arguments were doubtless strategic as well. Particularly, where the prosecutor's portrayal of the Defendant as a professional hit man was supported by the evidence that he had lain in wait until most potential witnesses had left the pool side party and he could murder the three remaining men with ammunition available in his .45 caliber automatic pistol. It was entirely reasonable from the facts

demonstrated at trial to say that the Defendant, who gunned down Ray Peters and two potential witnesses, in cold blood at 2:00 a.m., was conducting a professional "hit." Extended argument over the point could only serve to reinforce the idea in the mind of the jury. Further, trial counsel had presented a dozen alibi witnesses, attempting to place the Defendant in Texas at the time of the triple murder in Oklahoma City. Unnecessary argument over prosecutor's closing remarks could only serve to detract from the force of the alibi testimony. These matters were clearly strategic made by trial counsel with over 30 years' experience and, as such, are "virtually unchallengeable." Strickland v. Washington, 80 L. Ed. 2d at 695.

The Defendant fails on the second prong of the test announced by the Court

in Strickland v. Washington, supra. In that case, this Court stated:

> ". . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., 80 L. Ed. 2d at 698.

The only prejudice the Defendant now identifies to help the Court make the determination necessary under Strickland is found on page 24 of the Petition, where the Defendant claims as prejudice that he was an innocent man who was 300 miles away from the scene of the crime, but yet was convicted. However, this "prejudice" is merely a reassertion of his alibi defense. The State presented its eyewitnesses placing the Defendant at the scene of the triple murder, while the Defendant presented alibi witnesses attempting to place him in Texas at the time of the murders in Oklahoma City.

It cannot be said that the confidence in the outcome of a criminal trial is in doubt where a jury must choose, as a matter of fact and evidence, between two competing and inconsistent accounts of the truth. To permit such jury decisions to constitute "prejudice" would emasculate not only Strickland, but also the jury system.

Even given Defendant's asserted errors of his trial counsel, there is no reasonable possibility of a different result in the guilt phase of his trial. None of the asserted errors would have changed the balance which caused the jury to credit the eyewitnesses' placing him at the scene of the murder rather than the alibi witnesses attempting to place him in Texas. Strickland makes clear that the point of the adversarial system is to produce a just result. Strickland v. Washington, 80 L. Ed. 2d

at 692-93. The point of the adversarial system is not to contention for the sake of contention, but instead is to produce a just result through vigorous but fair advocacy on both sides. In this sense, Defendant's trial counsel was more than adequate and the result was just.

The Defendant departs from the teachings of Strickland v. Washington, supra, in his criticism of trial counsel's failure to put on evidence or make argument during the punishment phase of the trial. Strickland teaches us that the adequacy of counsel's performance must be evaluated from conduct from the counsel's perspective at the time, giving that conduct a strong presumption that it falls within the wide range of reasonable professional assistance. Id., 80 L. Ed. 2d at 694-95. From counsel's perspective at the time of trial, it became clear when the jury returned a

verdict of guilt that the alibi defense had failed. This meant that the jury either disbelieved the alibi witnesses or believed the State's "airplane theory." If further means that the jury found the Defendant guilty, beyond a reasonable doubt, of laying in wait to shoot three men to death with .45 caliber hollow-point bullets. From counsel's perspective at that point, he made a strategic decision almost brilliant in its simplicity.

What appears at first to be a troubling failure of counsel is, in fact, a cunning tactical decision. Given the fact the jury returned a guilty verdict on three counts of First Degree Murder, it was almost sure from the underlying circumstances that they would return some, if not all, of the aggravating circumstances sought by the State. These aggravating circumstances were

that the Defendant created a risk of death to more than one person (Tr. 694-95), that the murder was committed for purposes of avoiding or preventing lawful arrest or prosecution, that the murder was especially heinous, atrocious or cruel (Tr. 695), or that there was a probability the Defendant would commit criminal acts of violence and would constitute a continuing threat to society (Tr. 696). At the same time, none of the standard mitigating circumstances applied to the Defendant. See Appendix B, copy of trial court's instructions on minimum mitigating circumstances. Even now, in the Petition for Writ of Certiorari, the Defendant offers the Court no hint or clue of what evidence in mitigation would have been appropriate. Thus, it becomes clear that the Defendant had, and continues to have, no mitigating evidence to offer. The murder involved

was one of deliberate assassination of three men, shot down in cold blood.

This Court noted in United States v. Chronic, ___ U.S. ___, 104 S. Ct. ___, 80 L. Ed. 2d 657 (1984), the following:

> "Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. . . ." Id., 80 L. Ed. 2d at 666, n. 19.

First, counsel had no duty to do what was impossible or unethical in manufacturing nonexistent mitigating evidence. Further, if counsel did nothing and yet his client was sentenced to life, his client would have been well served by counsel's decision not to attempt the useless charade of presenting mitigating evidence. On the other hand, if, as actually happened, his client was sentenced to death, his strategic decision

to do nothing might appear to an appellate court to be ineffective assistance and might result in modification by the Court of Criminal Appeals from the death penalty to life imprisonment. Such a result would be highly likely in light of the law in Oklahoma prejudice in the second stage of a bifurcated proceeding can only result in modification, if necessary, but not reversal. Irvin v. State, 617 P.2d 588, 599 (Okl.Cr. 1980).

In the case at bar, Mr. Burger has been engaged in the practice of law for over 30 years. His practice consists largely of cases in the field of criminal law. He also has been employed as a county prosecutor. He has tried in excess of three dozen murder cases. He is well seasoned in the area of criminal law and has had considerable experience with cases similar to this one. The failure to present a case during the

second stage of trial is a trial strategy which Mr. Burger has used quite successfully in the past. In the case of Daugherty v. State, 640 P.2d 558 (Okl. Cr. 1982), Mr. Burger was the trial counsel. At trial, the defendant was convicted of murder in the first degree. During the penalty stage, the defendant was sentenced to life imprisonment despite the fact that no opening statement was made, no evidence was presented, and only a perfunctory closing argument was made. See Appendix C, copy of counsel's closing argument in Daugherty. It is obvious that this is a trial strategy which has been used successfully by Mr. Burger in the past. With nothing of substance to offer in mitigation, trial counsel relied on his proven strategy.

Thus, while Mr. Burger had nothing in mitigation to offer during the sentencing phase, he elected to do nothing

in the hope that his inaction might save his client's life on appeal where no effective action could save it at trial. However, even before this Court, the Defendant is unable to show any prejudice in the sense of a reasonable probability of different result had his trial counsel made any other tactical decision. Instead, on page 28 of the Petition, the Defendant cites to Justice Brennan's footnote number 2 in Strickland for the proposition that some denial of counsel constitutes error without any showing of prejudice. However, this attempt wrenches Justice Brennan's thinking out of context, particularly in the case where, as here, trial counsel's decision was a tactical one based upon the absence of mitigating evidence and the hope of modification by the Court of Criminal Appeals. To permit reversal because of such deliberate tactics of

trial counsel would be to ignore Strickland's requirement that the defendant show genuine prejudice as a result of his counsel's activities.

In light of the facts and circumstances at the time, Defendant's counsel had nothing in mitigation to offer and rested his approach, by strategic decision, in a hope of modification by the Court of Criminal Appeals, or this Court, if the jury returned the death penalty. In a sense, where defense counsel had nothing of substance to offer, it is perhaps the most competent thing he could have done under the circumstances. The Defendant herein has not rebutted the strong presumption of adequate assistance and exercise of reasonable professional judgment, nor has he met the Strickland burden of showing a likely possibility the result would have been different under any conceivable course his trial counsel could have

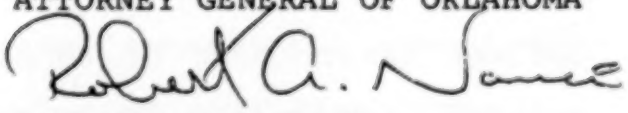
taken. Therefore, his counsel was clearly adequate within the tests set out by this Court in Strickland v. Washington.

CONCLUSION

For reasons set out above, the State of Oklahoma respectfully requests this Court to deny the writ of certiorari herein.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA



ROBERT A. NANCE *
ASSISTANT ATTORNEY GENERAL
DEPUTY CHIEF, FEDERAL DIVISION

ROBERT W. COLE
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

ATTORNEYS FOR RESPONDENT

* Counsel of Record